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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BILL CLINTON, GOVERNOR OF
ARKANSAS, ET AL ..... *Petitioners*

vs.

M. C. JEFFERS, ET AL ..... *Respondents*

JURISDICTIONAL STATEMENT

WINSTON BRYANT*
TIM HUMPHRIES
FRANK J. WILLS

Arkansas Attorney General
323 CENTER ST., SUITE 200
LITTLE ROCK, AR 72201-2610
(501) 682-2007

**Counsel of Record*

ARKANSAS LEGISLATIVE DIGEST, INC

QUESTIONS PRESENTED

This appeal presents two related questions concerning the propriety of a district court's levying a fifty per cent. "enhancement" of a $653,687.00 lodestar fee award made pursuant to civil rights fee shifting statutes and based solely upon the risk of loss faced by respondents' attorneys, specifically:

I.

WHETHER THE MAJORITY'S DECISION TO GRANT A FIFTY PER CENT. ENHANCEMENT OF THE LODESTAR FEE AWARD SOLELY TO COMPENSATE RESPONDENTS' ATTORNEYS FOR RISK OF LOSS WAS CONTRARY TO LAW BECAUSE IT PRODUCED NOT A REASONABLE FEE, BUT RATHER AN ILLEGAL WINDFALL.

II.

IF A RISK OF LOSS ENHANCEMENT TO A LODESTAR FEE AWARD IS PERMISSIBLE, DID THE MAJORITY ERR WHEN IT MADE THE AWARD WITHOUT ANY FINDING THAT THIS CASE PRESENTED THE RARE AND EXCEPTIONAL CIRCUMSTANCES THAT WOULD JUSTIFY SUCH AN ENHANCEMENT.

LIST OF PARTIES

The Petitioners, who were defendants in the action below, are Bill Clinton, the Governor of Arkansas, W. J. McCuen, the Arkansas Secretary of State, and Winston Bryant, the Arkansas Attorney General, all in their official capacities and as members of the Arkansas Board of Apportionment. The Respondents, who were plaintiffs in the action below, are M. C. Jeffers, Al Porter, Evangeline Brown, Clyde Collins, O. C. Duffey, Earl Foster, The Reverend Ellihue Gaylord, Shirley M. Harvell, Linda Shelby, J. C. Jeffries, Lavester McDonald, Joseph Perry, Clinton Richardson, T. E. Patterson, Ernest Simpson, Bryan Smith, and Charlie Statewright.

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JURISDICTIONAL STATEMENT

Governor Bill Clinton of Arkansas, together with the other two members of the Arkansas Board of Apportionment, respectfully submit that this jurisdictional statement presents questions so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

OPINIONS BELOW

The opinion and dissent of the district court (J.S. App. 1) are reported at 776 F.Supp. 465 (E.D. Ark. 1991).

JURISDICTION

The district court entered its final order awarding fees under the fee shifting provisions of the Voting Rights Act, 42 U.S.C. §19731(e), on October 24, 1991. J.S. App. 1. Petitioners

filed their notice of appeal on November 20, 1991. J.S. App. 21. This Court has jurisdiction under 28 U.S.C. §1253.

STATUTE INVOLVED

42 U.S.C. §19731(e) provides:

> Attorney's fees
>
> (e) In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Respondents prevailed in their 1989 challenge to Arkansas' 1981 State Legislative Apportionment Plan, which was brought pursuant to §2 of the Voting Rights Act, 42 U.S.C. §1973b. Following respondents' application under 42 U.S.C. §19731(e) for an award of fees and costs, a majority of the district court three-judge panel awarded respondents' counsel fees and costs totaling $1,034,492.00. J.S. App. 20.

The fee and cost award was comprised of three elements: a "lodestar" fee award, based partially upon market rates outside the relevant community (J.S. App. 5), of $653,687.00; a cost and expense award of $72,060.00; and a fifty per cent. "contingency" enhancement of $308,745.00, which was made solely to compensate respondents' attorneys for the "risk of loss." J.S. App. 14. That enhancement was awarded over petitioners' objection and one panel member's dissent. J.S. App. 13, 16. The majority made no finding that this case presented rare and exceptional circumstances which would justify the contingency enhancement.

Petitioners have paid respondents' counsel all of the fee and cost award except the $308,745.00 risk-of-loss enhancement. A unanimous district court granted petitioners' request to stay payment of the enhancement pending resolution of this appeal. J.S. App. 23-24.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Introduction. This appeal raises the question of when it is proper, if ever, to enhance a fee award, calculated under the "lodestar" method, solely to compensate prevailing party's counsel for the "risk of loss" they faced in bringing civil rights actions. Although the propriety of such "contingency" enhancements has been before the Court recently, see *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987) (hereinafter "*Delaware Valley II*"), no clear answer has emerged.[1] In *Delaware Valley II*, four members of the Court were "unconvinced that Congress intended the risk of losing a lawsuit to be an independent basis for increasing the amount of any otherwise reasonable fee. . . ." *Id.* at 725. Of the four justices who unqualifiedly endorsed contingency enhancements, only two remain. Although there is no clear concensus on the issue, it appears that a majority of the Court has eschewed the contingent-fee analysis that the district court used to justify its risk-of-loss enhancement award. J.S. App. 12-13; see *Venegas v. Mitchell*, 495 U.S. 82, ___ (1990) ("[In] construing §1988, we have generally turned away from the contingent-fee model to the lodestar model of hours reasonably expended compensated at reasonable rates"); Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) ("It should also be noted that we have not accepted the contention that fee awards in §1983 damages cases should be modeled

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[1] Although *Delaware Valley II* addressed the propriety of contingency enhancements in the context of 42 U.S.C. 7604(d), the same standards appear to govern fee awards made pursuant to other civil rights statutes, including the Voting Rights Act. See *Pennsylvania v. Del. Valley Citizens Council for Clean Air*, 483 U.S. 711, 713, n.1 (1987); *Coalition to Preserve Houston v. Interim Board of Trustees of Westheimer Independent School Dist.*, 494 F.Supp. 738, 742 (S.D. Tex. 1980), *aff'd mem.*, 450 U.S. 901 (1981).

upon the contingent-fee arrangements used in personal injury litigation.").

Plenary review of the questions presented in this appeal is required to provide guidance to the lower courts, which are split on the issue of contingency enhancements. Compare *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1985) (risk of loss, alone, does not justify enhancement) and *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 28-29 (D.C. Cir. 1984) (risk of loss only justifies enhancement in "rare and exceptional circumstances") *with Morris v. American National Can Corporation*, ___ F.2d ___, 1991 W.L. 271737 (8th Cir. 1991) and *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 611, 613 (1st Cir. 1985) (disagreeing with *McKinnon* and noting the split among circuits). This appeal presents the issues clearly and cleanly, for not only did the district court improperly enhance the lodestar fee award solely to "compensate the plaintiffs' attorneys for the risk of loss," J.S. App. 14, but also made its risk-of-loss enhancement without a finding that this case presented rare and exceptional circumstances. J.S. App. 11-13, 14.

I.

WHETHER THE MAJORITY'S DECISION TO GRANT A FIFTY PER CENT. ENHANCEMENT OF THE LODESTAR FEE AWARD SOLELY TO COMPENSATE RESPONDENTS' ATTORNEYS FOR RISK OF LOSS WAS CONTRARY TO LAW BECAUSE IT PRODUCED NOT A REASONABLE FEE, BUT RATHER AN ILLEGAL WINDFALL.

The prevailing party in a Voting Rights Act case is entitled to recover a "reasonable attorneys fee." 42 U.S.C. §1973l(e). However, it is only a *reasonable* fee; civil rights

fee shifting statutes were not designed nor intended to produce financial windfalls for lawyers. See, *Blum v. Stenson*, 465 U.S. 886, 897 (1984).

In calculating respondents' attorneys fees according to the lodestar method, the district court arrived at a figure of $653,687.00, which is presumed to be a "reasonable fee" for purposes of the civil rights fee shifting statutes. *Blum*, 465 U.S. 897. Although petitioners urged the district court to use market rates prevailing in the local community to calculate the lodestar, J.S. App. 3, *see Id.* at 895, the majority concluded that "it (was) reasonable to pay at least some of plaintiffs' out-of-town lawyers at out-of-town rates." J.S. App. 5. It then calculated the lodestar for at least one of respondents' lawyers at a rate that "may slightly exceed the local market rate from most top-notch lawyers."[2] J.S. App. 5. As a result, the district court arrived at a lodestar fee figure that not only was presumptively reasonable, but also was higher than a fee would have been if calculated according to prevailing market rates in the relevant community.

The district court then enhanced the lodestar, based solely upon "the risk of loss."[3] J.S. App. 14. Notwithstanding their making a fee award in excess of that which would have been made if calculated according to prevailing local market rates, the majority then determined that civil rights plaintiffs

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[2]Although the district court's methodology of calculating the lodestar is not a subject of this appeal, it is detailed to illustrate the generous nature of the fee award made.

[3]It could be argued that there was very little risk of loss involved for respondents in this case. *Compare, Jeffers v. Clinton*, 730 F.Supp. 196 (E.D. Ark. 1989) (Arnold, J.) *with Smith v. Clinton*, 687 F.Supp. 1310 (E.D. Ark. 1988) (Arnold, J.); *see Laffey*, 746 F.2d 29

in general, not the plaintiffs in this particular action,[4] would face substantial difficulty in retaining counsel absent "the prospect of enhancement." J.S. App. 12. Such *post hoc* justification freed the district court from having to assess the need for risk enhancement in this particular case and allowed it to award respondents a windfall based upon its perception "that the civil rights market in Arkansas has changed" in the last nine years; presumably for the worse for civil rights plaintiffs' attorneys. J.S. App. 13. Not only does such reasoning ignore the requirement that civil rights fee awards "must be determined on the facts of each case," *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), but also flies in the face of the *Delaware Valley II* plurality's observation that "any further increase in (the lodestar) sum based on the risk of not prevailing would result not in a 'reasonable' attorneys fee, but in a windfall for an attorney who prevailed in a difficult case." *Delaware Valley II*, 483 U.S. 727. Having liberated itself from the constraint that a fee award in a given case be dependent upon the facts of that case, the majority was then free to improperly enhance the fee award in this case in an apparent attempt to stimulate the sagging local "civil rights market." See J.S. App. 13.

A plurality of the Court has concluded "that multipliers or other enhancements of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting statutes." *Delaware Valley II*, 483 U.S. 727. A split in the circuits over this conclusion exists.

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[4] In this action, plaintiffs actually were represented simultaneously by eleven lawyers. J.S. App. 19. Five of those lawyers live and practice in Arkansas. Regardless of the assertions made in respondents' fee applications, it appeared that there was no dearth of lawyers willing to represent them.

Compare McKinnon, 750 F.2d 1392 *with Morris*, ___ F.2d ___ , 1991 W.L. 271737. Therefore, the question whether it is ever proper to enhance a lodestar fee award solely to compensate respondents' attorneys for risk of loss is a substantial question requiring plenary consideration by the Court.

II.

IF A RISK OF LOSS ENHANCEMENT TO A LODESTAR FEE AWARD IS PERMISSIBLE, DID THE MAJORITY ERR WHEN IT MADE THE AWARD WITHOUT ANY FINDING THAT THIS CASE PRESENTED THE RARE AND EXCEPTIONAL CIRCUMSTANCES THAT WOULD JUSTIFY SUCH AN ENHANCEMENT.

If risk of loss, alone, can ever justify enhancing a presumptively reasonable lodestar fee award, then the district court erred when it acceded to respondents' enhancement request without finding that this case presented rare and exceptional circumstances. The Court has made it clear that only in cases of "exceptional success" does the possibility of enhancement exist. *Blum*, 465 U.S. 901. That language has been interpreted to mean that only rare and exceptional circumstances can ever justify an upward adjustment of the lodestar to reflect the contingency of payment due to the risk of loss. *Laffey*, 746 F.2d 28-29; *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991). The purpose of requiring "rare and exceptional circumstances" before a contingency enhancement may be allowed appears to be to prevent arbitrary or unjust fee awards. cf. *Delaware Valley II*, 483 U.S. 732 (a risk noted by Justice O'Connor).

What is meant by the term "rare and exceptional" has

been the subject of debate among the circuits. *See Laffey*, 746 F.2d 28-29; *Lewis v. Coughlin*, 801 F.2d 570, 574-75 (2nd Cir. 1986); *Hendrickson*, 934 F.2d 162, 163. According to this Court, the term appears to apply "only in the *rare* case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was *exceptional*." *Blum*, 465 U.S. 899 (emphasis supplied). Regardless of what the Court meant by the term "exceptional" there has been fairly clear guidance as to what the term does not mean. It does not mean that the issues presented were novel or difficult. *Delaware Valley II*, 483 U.S. 731. It does not mean that the danger of protracted litigation existed. *Id.*

In this case, the district court made no finding that circumstances qualifying as "rare and exceptional" existed in granting the enhancement. Although the majority found that plaintiffs' attorneys "did a splendid job" and provided "efforts (that) were superb," it rewarded them by allowing higher than local market rates. J.S. App. 5. It made no finding that the quality of services rendered was superior in light of the hourly rates charged. *See Blum*, 465 U.S. 899.

The majority also noted that "over 5,000 billable hours does seem like an extraordinary amount of time to spend on one case." J.S. App. 6. However, noting respondents' "Herculean" efforts, it found that "the plaintiffs' lawyers and paralegals reasonably expended 5,060.88 hours in this case." J.S. App. 7. That total included compensation for work performed in connection with respondents' unsuccessful efforts to intervene in an earlier Voting Rights Act case. J.S. App. 10.

In refusing to be confined to awarding the risk of loss

enhancement in the "rare and exceptional case," the district court was free to provide a windfall to respondents' already generously compensated attorneys. Unmoored to the standard of the rare and exceptional case, the majority has injected the possibility of arbitrary fee awards into the jurisprudence governing fee awards in civil rights actions. Rather than being reserved for the "rare and exceptional" case, enhancement of fee awards appears becoming the rule rather than the exception. *See Morris*, ___ F.2d ___ , 1991 W.L. 271737. The Court should note probable jurisdiction over this appeal because the question whether a risk of loss enhancement is appropriate absent a finding of rare and exceptional circumstances is a substantial question requiring plenary consideration by the Court.

CONCLUSION

Jurisdiction should be noted. The questions presented within this jurisdictional statement are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

By: WINSTON BRYANT
Attorney General
TIM HUMPHRIES
Assistant Attorney General
FRANK J. WILLS
Assistant Attorney General
323 Center St., Suite 200
Little Rock, AR 72201-2610

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Frank J. Wills, Assistant Attorney General, do hereby certify that I have served the foregoing by mailing a copy of same, U.S. Mail, postage prepaid, to P. A. Hollingsworth, 415 Main Place, Little Rock, AR 72201, on this 21st day of January, 1992.

/s/ Frank J. Wills

APPENDIX

In THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

M. C. Jeffers, Al Porter, Evangeline Brown, Clyde Collins, O. C. Duffy, Earl Foster, The Rev. Ellihue Gaylord, Shirley M. Harvell, Linda Shelby, J. C. Jeffries, Lavester McDonald, Joseph Perry, Clinton Richardson, T. E. Patterson, Earnest Simpson, Brian Smith, and Charlie Statewright, on behalf of themselves and all others similarly situated, ... *Plaintiffs,*

v. No. H-C-89-004

Bill Clinton, in his official capacity as Governor of Arkansas and Chairman of the Arkansas Board of Apportionment; W. J. McCuen, in his official capacity as Secretary of State of Arkansas and member of the Arkansas Board of Apportionment; and Steve Clark, in his official capacity as Attorney General of Arkansas and member of the Arkansas Board of Apportionment, ... *Defendants.*

Submitted: June 11, 1991
Filed: _____

Before ARNOLD, Circuit Judge, EISELE, Senior District Judge, and HOWARD, District Judge.*

ARNOLD, Circuit Judge.

*It has apparently been customary in three-judge-court cases for the originating district judge to decide fee matters for himself or herself. *E.G.*, *Smith v. Clinton*, No. LR-C-88-29 (E.D. Ark. July 26, 1990). The statute permits this practice, but it does not require it. In this case, the entire Court chooses to consider and decide the motion for fees.

We have before us plaintiffs' final motion for attorneys' fees and expenses. Over two years ago the plaintiffs filed this lawsuit challenging the apportionment of the General Assembly of Arkansas. They argued that the redrawing of legislative districts after the 1980 census violated the Voting Rights Act, 42 U.S.C. §1973 *et seq.*, and the Fourteenth and Fifteenth Amendments. After a twelve-day trial, the Court found that the plaintiffs had proved that the 1981 re-apportionment decreased the opportunity for meaningful minority participation in state politics. *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989). We enjoined the State from holding elections under the discriminatory apportionment, and ordered it to submit a new plan. It did so, and with modifications suggested by the plaintiffs, this Court approved the new plan in time for the 1990 elections. 756 F. Supp. 1195 (E.D. Ark. 1990). In due course, we filed another opinion on the plaintiffs' constitutional claims. Rejecting the bulk of the plaintiffs' contentions that the State acted with discriminatory intent, we agreed that the enactment of general-election run-off statutes for municipal offices violated the Fifteenth Amendment. 740 F. Supp. 585 (E.D. Ark. 1990). The State appealed that decision, as well as our earlier holding that the 1981 apportionment violated the Voting Rights Act, to the Supreme Court of the United States. On January 7, 1991, the Supreme Court summarily affirmed our decision on the plaintiffs' voting-rights claim. 111 S. Ct. 662 (1991). Several months later, the State withdrew its appeal on the constitutional claim. 111 S. Ct. 1096 (1991). Those decisions concluded the merits of the case.

The plaintiffs' victory has brought this request for reasonable attorneys' fees and other expenses of the lawsuit. The plaintiffs have asked for a total of $758,352 (after rounding individual requests to the nearest dollar) in fees for the eleven lawyers and seven paralegals who worked on the case. They have also asked that we double that amount to

reflect the contingent nature of the case. In addition, the plaintiffs have asked for $166,831[1] in other expenses. The particulars of their request are set out in Appendix A.

The State objects. It argues that most of the hourly rates requested by the plaintiffs are too high by Arkansas standards, that the plaintiffs' lawyers spent too much time on the case, that there is no need to enhance the attorneys' fee, and that many of the expenses plaintiffs claim are unreasonable or poorly documented. The State, however, has not opposed all of the plaintiffs' request. On two occasions, we have, on the plaintiffs' motions, ordered the State to pay undisputed amounts of the plaintiffs' request. The State has done so. Our final award will be decreased by those amounts, totalling $231,969.

In the main, we believe that plaintiffs' requests are reasonable. Their petition is thorough and well documented. We award attorneys' fees at rates ranging from $175 an hour for Ms. Hair and Mr. Hollingsworth, who jointly captained this case, to $90 an hour for Mr. Glover. With some adjustments, we award fees for the bulk of the time claimed by plaintiffs. The total fee award is $962,432. This figure represents a lodestar fee of $653,687 enhanced by a contingency multiplier of 50 per cent. Finally, again with reductions, this time substantial ones, we award various expenses of the litigation. The total expense award is $72,060. The details of our award of both attorneys' fees and expenses

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[1] In plaintiffs' final motion for attorneys' fees and costs, they request $167,741 in expenses. Our calculations reveal a total of $167,481 in expenses. Despite our efforts, we cannot account for the additional $260. Plaintiffs' motion also contains two requests for reimbursement of travel for J. Wilson on October 6, 1989, in the amount of $649.98. We have deducted this amount from their final request to avoid duplication, resulting in a final figure of $166,831.

can be found in Appendix B to this opinion. We reason to these conclusions as follows.

I.

Setting hourly rates for plaintiffs' lawyers and paralegals is our first task. The plaintiffs request a spectrum of rates for their lawyers, ranging from $195 an hour for co-lead counsel Hollingsworth to $90 an hour for attorney Glover. The plaintiffs support their request with numerous affidavits, attesting to the reasonableness of these hourly rates. The State, relying primarily on the fee order in *Smith v. Clinton*, No. LR-C-88-29 (E.D. Ark. July 26, 1990), urges us to cap the lawyers' fees at $130 an hour, and work down from there based on experience. The plaintiffs request between $60 and $40 for their paralegals. Again, relying on *Smith*, the State argues that $30 or $35 an hour is the going local rate, and therefore the reasonable rate.

The first legal question is whether all the out-of-town lawyers associated with the Legal Defense Fund should be held to local hourly rates. "[T]he prevailing market rates in the relevant community[]" are presumptively reasonable, *Blum v. Stenson*, 465 U.S. 886, 895 (1984). *Smith, supra*, holds that Little Rock, Arkansas is the relevant community for a voting-rights case such as this. The guiding principle here is the availability of qualified and willing local counsel. If it is reasonable for civil-rights plaintiffs to look beyond Arkansas to find such lawyers, then the Court may look beyond Arkansas in setting a reasonable hourly rate for their services. *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137 (8th Cir. 1982) (en banc). We do not read *Avalon Cinema*, however, to determine conclusively that no prospective civil-rights plaintiff will ever need to seek a lawyer who is not an Arkansan. *Avalon Cinema* requires, rather, a case-by-case determination of the need for outside counsel. 689 F.2d at

140-41. This mammoth case could not have been undertaken without the Legal Defense Fund's lawyers and resources. Indeed, it was not launched until local counsel could be certain of that partnership. See, *e.g.*, O. Neal Supplemental Statement at paragraphs 9, 10; P. Hollingsworth Supplemental Statement at paragraph 4. The expertise, energy, and resources to challenge numerous legislative districts, covering approximately one-third of Arkansas, are simply not currently available in this State. We conclude, accordingly, that it is reasonable to pay at least some of plaintiffs' out-of-town lawyers at out-of-town rates.

We believe the following schedule of hourly rates is reasonable. Ms. Hair, of the Legal Defense Fund, directed this case. She was the guiding force both before and at trial. She was first among equals as co-lead counsel, spending nearly twice as much time on this case as any other lawyer. And she did a splendid job. A reasonable hourly rate for her efforts, given her unique expertise in voting-rights cases, is the rate she requests: $175. Ms. Hair's rate may slightly exceed the local market rate for most top-notch lawyers. Since her services were essential, however, it is reasonable to pay the non-local hourly rate she requests. Justice Hollingsworth, co-lead counsel and the individual who diligently coordinated the plaintiffs' efforts in Arkansas, has requested $195 an hour. Though his efforts were superb, we think $175, the same rate allowed for Ms. Hair, is reasonable for Mr. Hollingsworth as well. See, *e.g.*, *Little Rock School District v. Pulaski County Special School District No. 1*, No. LR-C-82-866, Order at Schedule B (E.D. Ark. Feb. 6, 1991) (awarding Justice Hollingsworth $165 an hour for work done in 1988); *Greenwood v. Ross*, No. LR-C-79-406, Order at 7-8 (E.D. Ark. Feb. 2, 1989) (Howard, J.) (awarding Hollingsworth an average hourly rate of $135 for work during 1986-1988, while noting that $165 was his current hourly rate).

The rest of the plaintiffs' legal team will be paid at the

following hourly rates, which we find are reasonable: Ms. Karlan — $125; Ms. Cunningham, Ms. Dennis, and Mr. Bird — $110; Ms. Thomas, Ms. Bell, Mr. Neal, and Mr. Simes — $100; Mr. Glover — $90. We believe these rates reflect the relative experience and efforts in this case of the various lawyers. We agree with the State that at least some of the plaintiffs' paralegals should also be limited to the hourly rate currently paid in Arkansas. An hourly rate of $40 is reasonable for plaintiffs' local support staff. See *Little Rock School District, supra* at Schedule B. The paralegals helping non-local counsel, however, are entitled to the slightly higher non-local rate of $50 an hour.

II.

Having decided how much per hour to pay the plaintiffs' lawyers, we must now decide how many hours they should be paid for. The State points out that not all time spent on a case is billable time. The plaintiffs agree. The final fee request mentions several instances of time spent, but not charged. These were not insignificant efforts: they total, by the plaintiffs' estimation, some 900 hours of work. Even so, the plaintiffs seek fees for a large amount of time — 4,739.05 hours of lawyers' time and 671.1 hours of paralegals' time. The State argues forcefully that the request is excessive. First, the State sees many projects that supposedly took too long, for example, the two Supreme Court appeals. While only two motions and supporting briefs were produced, the plaintiffs seek pay for almost 400 hours of work. Moreover, the State points to what it considers duplicative efforts. For example, both Ms. Hair and Ms. Cunningham worked on the post-trial papers. Finally, the State argues that some of the claimed time is simply not properly considered billable time. A prominent example is the travel time claimed by non-local counsel. On its face, the State's general point has weight. Over 5,000 billable hours does seem like an extraordinary amount of time to spend on one case.

On reflection, however, we are persuaded that most of the plaintiffs' lawyers' and paralegals' time was necessary and well spent. This was a Herculean effort. We tried the case for twelve days. It involved a cloud of witnesses and a mountain of exhibits. Extensive expert testimony was required. It took this Court three opinions to consider and decide the many issues raised. As the plaintiffs remind us, the State has recognized the magnitude of the case. It noted that the remedy, for example, "involve[d] twenty-three of one hundred House districts and eight of thirty-five Senate districts [and] affect[ed] hundreds of thousands of voters in east and south Arkansas." Defendants' Motion for Stay of Judgment Pending Appeal at 6, No. 89-2008 (U.S., filed March 12, 1990). The plaintiffs' lawyers' time records are in the main thorough and credible. Indeed, one aspect of the plaintiffs' final request deserves commendation. Responding to the State's initial concerns, almost every lawyer's claim was revised by omitting some challenged time. There are exceptions, of course, and the State has done a good job of bringing them to the Court's attention. We consider them in detail below. Any remaining excessiveness or duplication is negligible. Accordingly, we find that the plaintiffs' lawyers and paralegals reasonably expended 5,060.88 hours in this case. The particulars of this finding are set out in Appendix B.

The State first contends that almost every lawyer spent too much time working on the case. It suggests across-the-board cuts in most of the lawyers' time requests. The State's blanket assertions are not persuasive. It attacks, for example, the 89 hours Ms. Hair spent on the post-trial brief. That document was invaluable to the Court in preparing its opinion. We see excellence here, not excessiveness. The State also points to Ms. Hair's and Ms. Cunningham's efforts on appeal. It calculates the cost of plaintiffs' motions to dismiss in the Supreme Court at $1,300 a page for the first motion and $890 a page for the second one. Those figures alarm. But like

most statistics, they do not tell the whole story. Divided into legal research, strategy conferences, review of the record, and actual drafting and editing, plaintiffs' efforts on appeal come into focus. Beyond the statistics lie diligence and craftsmanship, not excess. Further, not all of this time was devoted to the documents themselves: the lawyers also spent time helping the Justice Department through the extensive record on appeal. Moreover, the State's cost estimates do not account for our reduction in Ms. Cunningham's hourly rates. In general, then, we find the amount of time plaintiffs spent both justifiable and justified.

The State is correct, however, in its general assertion regarding attorney Glover's records. Their indefiniteness is troubling. The plaintiffs' response — that Glover did valuable work gathering evidence — is probably true, but it is insufficient to meet the State's objection. The infirmity lies in the lack of thorough documentation. The bulk of plaintiffs' fee request sets a high standard on this score, one that Glover's request does not meet. Our uncertainty leads us to award Glover one-half of the hours claimed for his work outside of trial.

The State next contends that the plaintiffs' lawyers duplicated each other's work. The fee award, the State continues, should be reduced accordingly. We agree that it is unreasonable to pay for the same work twice. It is not unreasonable, however, to divide responsibilities among many lawyers in a large case such as this. To remedy any duplication caused by the shuffling of lawyers, the plaintiffs have not claimed any time for lawyer Ifill of the Legal Defense Fund. That amounts to 118 hours. This is a reasonable adjustment. Except for the specific instances discussed below, we reject the State's duplication objections.

While this case needed a team of lawyers and legal

assistants to prepare and try, we are nevertheless convinced that fewer people could have done the job at trial. There were always five, and sometimes as many as eight, lawyers at the plaintiffs' table. That is duplicative. We believe three lawyers, or at most four, could have tried this case effectively. All of the co-lead counsels' time at trial is reasonable: Ms. Hair and Justice Hollingsworth needed to be in the courtroom to run their case. Each of the other lawyers' trial-time requests, however, must be reduced. A rotation of effort would have been the better course. To effect that rotation — in pay, if not in time — we award each of the other lawyers one-half of the trial time they claim. The same problem arises with respect to paralegals. One was surely a necessity. The three legal assistants that worked the trial, often in pairs, were not. We award each of them one-half of the trial time they claim.

The State also sees duplication during the remedy phase of the case. Often two, and sometimes three, lawyers attended each meeting of the Board of Apportionment. One lawyer could have adequately represented the plaintiffs' views at each meeting. Justice Hollingsworth was the only plaintiffs' lawyer to attend all of the meetings. He was their logical representative, and we award all of his time. Lawyers Neal and Simes, on the other hand, though helpful, were not necessary participants on every occasion. We award half of the approximately thirty-nine hours they claim for attending Board meetings.

We come finally to the third aspect of the State's excessiveness argument: improper time. The plaintiffs supposedly seek payment for time that it is not appropriate to bill. The State first contends that it is unreasonable to bill for time the out-of-town lawyers spent travelling to and from Arkansas. Here again, the State relies on the order awarding fees in the *Smith* case. As plaintiffs point out, much of the contested time was spent travelling in Arkansas interviewing

witnesses and gathering evidence. This is clearly appropriate. Further, we have found, distinguishing *Smith*, that this case could not have been prosecuted without a partnership of local and non-local counsel. It follows, therefore, that it is reasonable for those out-of-town lawyers to expect pay for the time spent getting to and from their client. *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 396 (8th Cir. 1987); *Craik v. Minnesota State University Board*, 738 F.2d 348, 349-50 (8th Cir. 1984) (per curiam). Moreover, though it is not required, at least some of the plaintiffs' lawyers often worked in transit. See, *e.g.*, Statement of D. Cunningham at paragraph 4; Supplemental Declaration of P. Hair at paragraph 18.

The State also contends that chunks of Ms. Hair's, Ms. Karlan's, and Mr. Simes's claims are not related to this case at all. The challenged time involves the unsuccessful intervention in *Smith v. Clinton*. The plaintiffs acknowledge the State's point, but claim that the failed intervention formed the foundation of the *Jeffers* complaint. The *Smith* time, plaintiffs say, is thus also *Jeffers* time, and as such is properly claimed now. We are persuaded by the plaintiffs' explanation.

The State finally points to a miscellaneous list of claimed time it says is improper. Much of what it objected to along these lines has been withdrawn in the plaintiffs' final request. Two remaining items need to be adjusted. Ms. Hair claims the 7.3 hours she spent getting an apartment in Little Rock. Since she is not from here, she needed a place to stay during the trial. It is not reasonable, however, to pay Ms. Hair $175 an hour to do what another (a local paralegal, for example) could have done for far less. We do not believe a private client would pay a lawyer for an apartment search or getting the utilities hooked up. This part of Ms. Hair's request is denied. Mr. Neal claims fourteen hours for monitoring elections in the new districts created by this case. The State does not see the relevance of

this time. Neither do we.[2] We reject the rest of the State's objections to the time claimed by plaintiffs' lawyers and paralegals.

III.

Multiplying the adjusted hourly rates by the adjusted amounts of time worked by each lawyer and paralegal yields an attorneys' fee of $653,895. That is what the cases call the "lodestar" figure. As the name suggests, it is a guide. The lodestar "*is presumed* to be the reasonable fee to which counsel is entitled." *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 564 (1986) (emphasis in original, quotation omitted). Plaintiffs, however, seek more. They request that we enhance their attorneys' fee by 100 per cent. In other words, they ask us to double it.

The Supreme Court has held that in certain circumstances enhancing the lodestar to account for the possibility of loss is proper. *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 731, 733-34 (1987) (*Delaware Valley II*) (O'Connor, J., concurring in part and concurring in the judgment). The animating principle — of both the underlying fee statutes and the cases interpreting them — is the need to attract competent counsel for meritorious cases. If a contingency enhancement is necessary to meet this need, then it is reasonable to award one. See, *e.g.*, *Hendrickson v. Branstad*, 934 F.2d 158, 162-63 (8th Cir. 1991). Useful facts in analyzing this issue are how the "particular market compensates for

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[2] In their final motion for attorneys' fees, plaintiffs state they do not claim 30.5 hours billed by Mr. Neal. Since the plaintiffs do not indicate *which* 30.5 hours they are not claiming, we err on the side of assuming (since plaintiffs have the burden of establishing the right to the fees) the hours they do not claim are not the hours Mr. Neal billed for monitoring elections.

contingency" cases as a class, and whether, "without an adjustment for risk[,] the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market." *Delaware Valley II*, 483 U.S. at 733 (quotation and citation omitted).

We conclude the plaintiffs here have met their burden under *Delaware Valley II* to justify enhancement of their attorneys' fees. Under *Morris v. American National Can Corp.*, 941 F.2d 710, 715 (8th Cir. 1991),[5] the plaintiffs are not required to show that they "actually faced substantial difficulty in retaining counsel[.]" Rather, the inquiry is whether the plaintiffs would have faced such difficulty in the absence of the prospect of an enhancement.

Plaintiffs here have made that showing. Justice Hollingsworth states "that without compensation for risk, no law firm [his] size can regularly accept [civil-rights] cases." P. Hollingsworth Supplemental Statement at paragraph 1. Another of the plaintiffs' attorneys, L. T. Simes, asserts that "[p]rior to contacting [the Legal Defense Fund], I approached two other organizations for assistance in this case — Eastern Arkansas Legal Services and the Lawyers' Committee for Civil Rights. Each of these organizations refused to handle the case because of its difficulty and broad scope." L. T. Simes Supplemental Statement at paragraph 5. Absent a contingency enhancement, he doubts plaintiffs could have retained competent attorneys.

We find the affidavit of Jim Guy Tucker particularly persuasive on this issue. He has no financial stake in the outcome of this case in particular or civil-rights cases as a class. In his affidavit, Lieutenant Governor Tucker expresses

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[5]A petition for rehearing with suggestion for rehearing en banc is pending before the Court of Appeals in *Morris*.

the opinion that without an enhanced hourly rate, attorneys have no incentive to accept voting-rights cases.

Similarly, plaintiffs have adequately demonstrated that the relevant market, Little Rock, Arkansas, compensates contingency cases as a class by enhancing attorneys' fees. Again, Justice Hollingsworth avers via affidavit, that he regularly receives four or five times his hourly rates in successful contingency cases. P. A. Hollingsworth Declaration at paragraph 9. Other attorneys provide a similar figure. R. Quiggle Statement at paragraph 4; O. Neal Supplemental Statement at paragraphs 6, 7 (four or five times hourly rate in personal injury cases; 1.75 times hourly rate in social-security cases). In a more conservative estimate, John Walker states that the Little Rock market tends to compensate attorneys in contingency cases "in the neighborhood of two to four times as much as their normal hourly billing rates." J. W. Walker Statement at paragraph 17.

Although the State disagrees with the plaintiffs' request for an enhancement of the lodestar, it has not presented any affidavits of its own which contradict those presented by the plaintiffs. Instead, it cites *dicta* in *Venegas v. Mitchell*, 110 S. Ct. 1679, 1682 (1990), for the proposition that enhancements are disfavored. It also relies on the Court of Appeals' observation in *Avalon Cinema*, 689 F.2d at 141, that "the day has not yet come when a civil-rights plaintiff must go out of [Arkansas] to get representation." In the face of the specific evidence presented by plaintiffs, we decline to rely on the State's general opposition to the plaintiffs' request. Moreover, we note that *Avalon Cinema* was decided nine years ago. Plaintiffs' uncontradicted affidavits indicate that the civil-rights market in Arkansas has changed since then. No such proof was before the *Avalon Cinema* court, and the issue in that case — the validity of a zoning ordinance under the First Amendment — was considerably less complex and specialized

than the multifarious questions presented in the present case.

Plaintiffs have established that they are entitled to an enhancement of their attorneys' fees. We cannot agree, however, that plaintiffs are entitled to a 100 per cent enhancement of these fees. Such an enhancement, we think, would result in a windfall to attorneys some of whom might have taken the case without the possibility of an enhancement. We find that an enhancement of 50 per cent will adequately compensate the plaintiffs' attorneys for the risk of loss without affording them a windfall. After eliminating those hours not entitled to enhancement (i.e., hours spent on the fee petition itself), our calculations reveal that the plaintiffs are entitled to an enhancement of $308,745, resulting in a total attorneys' fee award of $962,432.

IV.

The plaintiffs also seek reimbursement for other expenses of the litigation. These include expert witness fees, court costs, travel, photocopying, regular postage, telephone calls, and overnight mail. These expenses total approximately $170,000. The State raises both factual and legal objections.

The primary argument about what the law requires concerns the plaintiffs' expert witnesses. By statute, most witnesses are limited to $40 a day, plus reasonable expenses in some circumstances, in compensation for their time. 28 U.S.C. §1821. The State urges that we adopt that ceiling for all the witnesses in this case, including the experts. Many courts, see, *e.g., Friedrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989), *vacated*, 111 S. Ct. 1383 (1991), have allowed successful civil-rights plaintiffs to recover actual expert witness fees and expenses. In a recent case, however, the Supreme Court squarely rejected this special treatment of experts. *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138 (1991). The plaintiffs point out that this may not be the end of

the story. The proposed Civil Rights Act of 1991, which has been passed by the House of Representatives and is pending in the Senate, would overrule *West Virginia University Hospitals*. The plaintiffs urge us to withhold a ruling on this part of their fee petition until the Congress acts. We are not inclined to wait. It is true that we have retained jurisdiction in this case. By way of a legal argument, however, the most the plaintiffs can offer is the possibility that the law will change. That is not enough. Plaintiffs may recover only $40 per day of testimony plus travel expenses for each of their experts. *West Virginia University Hospitals*, 111 S. Ct. at 1148. Likewise, the fees not paid by plaintiffs but submitted directly to this Court by one of their experts, Jerry Wilson, cannot be recovered. We award the statutory fee plus allowable expenses, which amounts to a total award of $2,236 for plaintiffs' expert-witness costs.

The State also challenges the plaintiffs' expense claims in several other respects. While conceding the bulk of the court costs, it argues that four depositions not used at trial should be excluded. We disagree. The plaintiffs are correct in responding that these were reasonable discovery expenses. The State also challenges the approximately $10,000 plaintiffs seek in mail and telephone expenses. We agree that regular postage is not billed separately in this jurisdiction. *Smith*, *supra*, at 9. That part of plaintiffs' claim is denied. We find approximately $900 in regular postage in the various expense reports. That amount will be subtracted from the expenses we award to the lawyers who claimed the postage. The State relies on the fee order in the *Smith* case for its contention that overnight mail and most of the long-distance telephone expenses should likewise be rejected. This part of plaintiffs' request relates to the reasonableness of hiring non-local counsel. Having concluded it was reasonable to hire out-of-town lawyers, we will not impair their communications with their clients and with local counsel. These expenses are reasonable.

Finally, the plaintiffs have requested several thousand dollars for "miscellaneous expenses." The State objected. We too were troubled initially by the thinness of the plaintiffs' explanation of these expenses in their interim fee petition. In their final request, however, the plaintiffs responded by offering the State the opportunity to review the receipts beneath this request. In light of that offer, and the State's failure to elaborate any specific objection in its response to plaintiffs' final request, we conclude that most of these expenses should also be allowed. An exception is the additional $9,288 in miscellaneous expenses that relates to plaintiffs' expert-witness costs. For the reasons elaborated above, plaintiffs' experts are limited to their statutory fees. The State has conceded that the rest of the plaintiffs' expenses request — for such things as photocopies and exhibit preparation — is reasonable. It is accordingly allowed.

• • •

We have considered the plaintiffs' fee request, and the State's objections to it, with care. Our decision involves a lot of money. We do not award it lightly. Rather, we are convinced that these fees and expenses fairly compensate these lawyers for their efforts, while not providing them a windfall. The State will have thirty days from the date of this opinion to pay the award. The plaintiffs' request for interest on this award from the date their fee petition was filed is denied.

It is so ordered.

/s/ Richard S. Arnold
United States Circuit Judge

/s/ George Howard, Jr.
United States District Judge

This document entered on docket sheet 10/25/91.

EISELE, Senior District Judge, dissenting.

Although I agree with the majority that Plaintiffs' lead

attorneys did a first rate professional job in the representation of their clients in this voting rights case, I, nevertheless, dissent from the fee award because I find it clearly excessive. In my view too many lawyers and too many paralegals were used; the hourly rates awarded are too high and the number of hours allowed excessive. Furthermore, I do not believe, under the facts and circumstances of this case, that any contingency enhancement is called for. I recognize we are dealing here with matters of judgment so I see little benefit in setting forth my specific objections.

Without going into details, the award which I would have approved would be somewhat less than one-half of the award actually made by the Court to the Plaintiffs as the prevailing parties.

APPENDIX A
PLAINTIFFS' REQUEST[1]

I. TIME

A. Attorneys

1. P. Hollingsworth	738.20 hrs	x $195/hr	= $143,949
2. P. Hair	1458.00 hrs	x $175/hr	= $255,150
3. P. Karlan	130.10 hrs	x $150/hr	= $ 19,515
4. D. Cunningham	871.00 hrs	x $135/hr	= $117,585
5. D. Dennis	394.00 hrs	x $135/hr	= $ 53,190
6. P. Bird	92.00 hrs	x $135/hr	= $ 12,420
7. S. Thomas	428.60 hrs	x $125/hr	= $ 53,575
8. O. Neal	220.75 hrs	x $125/hr	= $ 27,594
9. K. Bell	12.90 hrs	x $125/hr	= $ 1,613
10. L. Simes	261.75 hrs	x $100/hr[2]	= $ 26,175
11. D. Glover	131.75 hrs	x $ 90/hr	= $ 11,858

B. Paralegals

1. T. Hollingsworth	216.00 hrs	x $ 60/hr	= $ 12,960
2. V. Thompson	30.00 hrs	x $ 60/hr	= $ 1,800
3. S. Mortman	121.30 hrs	x $ 60/hr	= $ 7,278
4. C. Birnhak	82.00 hrs	x $ 50/hr	= $ 4,100
5. S. Bradford	51.00 hrs	x $ 50/hr	= $ 2,550
6. T. Aldrich	20.80 hrs	x $ 50/hr	= $ 1,040
7. O. Hampton	150.00 hrs	x $ 40/hr	= $ 6,000
		TOTAL	= $758,352

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[1] All dollar amounts are rounded to the nearest dollar.

[2] Plaintiffs' petition does not speak with one voice on Mr. Simes's requested hourly rate. At some points, it is $100 per hour for all his time. At other points, it is $100 per hour for his time in court and $85 per hour for his time out of court. Since the State concedes, and we agree, that $100 an hour is a reasonable rate for all his time, the discrepancy is not material.

II. EXPENSES

A. Paid by the Legal Defense Fund

1. telephone, postage, and copying	$ 15,031
2. court costs	$ 9,296
3. expert witness fees and costs	$ 82,882
4. travel	$ 26,068
5. miscellaneous	$ 16,099
6. various expenses since June 1990	$ 1,776

B. Paid by Individuals

1. P. Hollingsworth	$ 9,891
2. O. Neal	$ 1,235
3. K. Bell	$ 131
4. L. Simes	$ 484
5. J. Wilson	$ 3,938
TOTAL =	$166,831

APPENDIX B
ATTORNEYS' FEES AND EXPENSES AWARDED

I. TIME

A. Attorneys

1. P. Hollingsworth	738.20 hrs x $175/hr =	$129,185
2. P. Hair	1450.70 hrs x $175/hr =	$253,873
3. P. Karlan	130.10 hrs x $125/hr =	$ 16,263
4. D. Cunningham	835.00 hrs x $110/hr =	$ 91,850
5. D. Dennis	359.00 hrs x $110/hr =	$ 39,490
6. P. Bird	92.00 hrs x $110/hr =	$ 10,120
7. S. Thomas	405.60 hrs x $100/hr =	$ 40,560
8. O. Neal	149.25 hrs x $100/hr =	$ 14,925
9. K. Bell	12.90 hrs x $100/hr =	$ 1,290
10. L. Simes	214.15 hrs x $100/hr =	$ 21,416
11. D. Glover	59.87 hrs x $ 90/hr =	$ 5,388

B. Paralegals

1. T. Hollingsworth	205.00 hrs x $ 50/hr =	$	10,250
2. V. Thompson	30.00 hrs x $ 50/hr =	$	1,500
3. S. Mortman	108.30 hrs x $ 50/hr =	$	5,415
4. C. Birnhak	82.00 hrs x $ 50/hr =	$	4,100
5. S. Bradford	51.00 hrs x $ 50/hr =	$	2,550
6. T. Aldrich	20.80 hrs x $ 40/hr =	$	832
7. O. Hampton	117.00 hrs x $ 40/hr77 =	$	4,680
	TOTAL =	$	653,687

II. EXPENSES

A. Paid by the Legal Defense Fund

1. telephone, postage, and copying	$	14,689
2. court costs	$	9,296
3. expert witness fees and costs	$	2,236
4. travel	$	26,068
5. miscellaneous	$	6,811
6. various expenses since June 1990	$	1,634

B. Paid by Individuals

1. P. Hollingsworth	$	9,541
2. O. Neal	$	1,181
3. K. Bell	$	120
4. L. Simes	$	484
5. J. Wilson	$	0
TOTAL =	$	72,060

III. FINAL ATTORNEYS' FEES AND EXPENSES AWARD

A. Total Time	$	653,687
+ Enhancement	$	308,745
+ Total Expenses	$	72,060
= Total Award	$	1,034,492
- Interim Awards	$	231,969
= Balance Due	$	802,523

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

M. C. Jeffers, et al. ..... Plaintiff

v. No. H-C-89-004

Bill Clinton, et al. ..... Defendants

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

Notice is hereby given that the defendants, Bill Clinton, W. J. McCuen, Winston Bryant and the Arkansas Board of Apportionment, hereby appeal to the Supreme Court of the United States from that portion of the final order awarding attorneys fees and costs which "enhanced" the fee award by fifty per cent. due to the possibility that the appellees might have lost the case. That order was entered on October 25, 1991.

This appeal is taken pursuant to Title 28, U.S. Code Section 1253.

Respectfully submitted,

WINSTON BRYANT
Attorney General

BY: /s/ Frank J. Wills
FRANK J. WILLS, III, #80162
TIM HUMPHRIES, #84080
Assistant Attorneys General
323 Center, Suite 200
Little Rock, AR 72201-2610
(501) 682-2007
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Frank J. Wills, III, Assistant Attorney General, do hereby certify that I have served the foregoing by mailing a copy of same, U.S. Mail, postage prepaid, to Les Hollingsworth, Lead Attorney for Plaintiffs, Hollingsworth Law Firm, P.A., Main Place Building, 415 Main Street, Little Rock, AR 72201, on this 20th day of November, 1991.

/s/ Frank J. Wills

In THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

M. C. Jeffers, Al Porter, Evangeline Brown, Clyde Collins, O. C. Duffy, Earl Foster, The Rev. Ellihue Gaylord, Shirley M. Harvell, Linda Shelby, J. C. Jeffries, Lavester McDonald, Joseph Perry, Clinton Richardson, T. E. Patterson, Earnest Simpson, Brian Smith, and Charlie Statewright, on behalf of themselves and all others similarly situated, ... *Plaintiffs,*

v. No. H-C-89-004

Bill Clinton, in his official capacity as Governor of Arkansas and Chairman of the Arkansas Board of Apportionment; W. J. McCuen, in his official capacity as Secretary of State of Arkansas and member of the Arkansas Board of Apportionment; and Steve Clark, in his official capacity as Attorney General of Arkansas and member of the Arkansas Board of Apportionment, ... *Defendants.*

Submitted: December 3, 1991
Filed: _____

Before ARNOLD, Circuit Judge, EISELE, Senior District Judge, and HOWARD, District Judge.

ORDER

The motion of defendants for partial stay of the order entered October 24, 1991, is granted. That portion of the

order which directs defendants to pay to plaintiffs' counsel $308,745.00 as enhancement is hereby stayed pending final disposition of the appeal. The unpaid amount, however, will bear interest from and after November 24, 1991, at the rate provided by law for judgments of United States district courts.

The motion of plaintiffs to hold defendants in contempt is denied.

It is so ordered.

/s/ Richard S. Arnold
United States Circuit Judge

/s/ G. Thomas Eisele
Senior United States District Judge

/s/ George Howard, Jr.
United States District Judge

This document entered on docket sheet on 12/6/91.

Supreme Court, U.S.
FILED
FEB 21 1992
OFFICE OF THE CLERK

No. 91-1210

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BILL CLINTON, GOVERNOR OF ARKANSAS, *et al.*,
Appellants,

v.

M.C. JEFFERS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Arkansas

MOTION TO DISMISS

P.A. HOLLINGSWORTH
415 Main Street
Little Rock, AR 72201
(501) 374-3420

PENDA D. HAIR*
1275 K Street, N.W.
Suite 301
Washington, DC 20005
(202) 682-1300

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON
DAYNA L. CUNNINGHAM
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

*Counsel of Record

QUESTION PRESENTED

Whether the Court has jurisdiction over an appeal from a decision of a three-judge District Court awarding attorney's fees and costs to the prevailing plaintiffs in a voting rights case, where the jurisdictional statute authorizes a direct appeal to the Supreme Court only "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction," 28 U.S.C. § 1253 (1988).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NO. 91-1210

BILL CLINTON, GOVERNOR OF ARKANSAS, *et al.*,
Appellants,

v.

M.C. JEFFERS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Arkansas

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MOTION TO DISMISS

Appellees move, pursuant to Sup. Ct. Rule 18.6, to dismiss the appeal on the ground that the Court lacks jurisdiction:

Proceedings Below

This is the third appeal in this case. The first two appeals challenged decisions of the three-judge District Court ruling on the merits of plaintiffs' voting rights claims.

Each of those appeals was taken from an order of the three-judge District Court granting an injunction. On the first appeal, No. 89-2008, the Court summarily affirmed the judgment of the three-judge District Court below. *Clinton v. Jeffers*, 111 S.Ct. 662 (1991), *affirming* 730 F. Supp. 196 (E.D. Ark. 1989) and 756 F. Supp. 1195 (E.D. Ark. 1990).[1] The defendants withdrew the second appeal, No. 90-394, after appellees filed a Motion to Affirm. 111 S.Ct. 1096 (1991).[2] This appeal involves a challenge to an order of the three-judge District Court, entered separately from the rulings on the merits and after the entry of injunctive relief

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[1]The lawsuit challenged the 1981 district lines for the Arkansas State House and Senate as violative of § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988), and the United States Constitution, and also contended that numerous instances of intentional discrimination by State and local officials justified placing Arkansas under pre-clearance procedures pursuant to § 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c) (1988). The District Court ruled in favor of plaintiffs on all but one of the legislative districts challenged under § 2 of the Voting Rights Act.

[2]The second appeal was from a subsequent opinion of the three-judge Court finding that a pattern of constitutional violations had occurred, which required placing the State under limited pre-clearance procedures. 740 F. Supp. 585 (E.D. Ark. 1990).

became final, awarding attorneys' fees to the plaintiffs-appellees.

In ruling on plaintiffs' request for an award of attorneys' fees,[3] the District Court concluded that this was a "mammoth case" and "a Herculean effort," requiring expenditure of enormous amounts of time and resources. J.S. App. A-5, A-7. The Court explained that the case "involved a cloud of witnesses and a mountain of exhibits," that "[e]xtensive expert testimony was required," and that "[i]t took [the] Court three opinions to consider and decide the many issues raised." J.S. App. A-7.[4] Despite the

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[3]In that request, plaintiffs voluntarily excluded approximately 900 hours of work performed on the litigation. J.S. App. A-6.

[4]The Court found that plaintiffs' challenge included "numerous legislative districts, covering approximately one-third of Arkansas." J.S. App. A-5. The Court also pointed out that defendants themselves had "recognized the magnitude of the case," noting "that the remedy, for example, 'involve[d] twenty-three of one hundred House districts and eight of thirty-five Senate districts [and] affect[ed] hundreds of thousands of voters in east and south Arkansas.'" J.S. App. A-7 (quoting Defendants' Motion for a Stay of Judgment Pending Appeal, No. 89-2008 (U.S., filed March 12, 1990), at 6.)

The case was so large and complex that the "expertise, energy and resources" to litigate it were "simply not . . . available" in the State of Arkansas. J.S. App. A-5. Therefore, the Court awarded

(continued...)

enormity of the effort required, the District Court denied compensation for many of the hours devoted to the case by plaintiffs' attorneys and awarded hourly rates that in many cases are significantly below those requested. J.S. App. A-6, A-8, A-9.

The District Court found that in order to be "reasonable," the statutory fee must be sufficient "to attract competent counsel for meritorious cases." J.S. App. A-11. Therefore, the Court adjusted the lodestar upward by 50 percent to compensate for the contingent nature of the fee arrangement.[5]

The Court relied on extensive, undisputed evidence submitted by plaintiffs demonstrating that the "market" of attorneys in Arkansas willing to undertake representation in

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[4](...continued)
plaintiffs' out-of-town, co-lead counsel a rate that "may slightly exceed the local market rate for most top-notch lawyers." J.S. App. A-5.

[5]Defendants argue that "there was very little risk of loss for [appellees] in this case." J.S. at 6 n. 3. Defendants' prior statements contradict this assertion. For example, even after plaintiffs prevailed in the District Court, defendants argued that "reversal is the most likely result on appeal." Defendants' Motion for a Stay of Judgment Pending Appeal, No. 89-2008 (U.S., filed March 12, 1990), at 6.

racial discrimination cases is a crisis state.[6] Because

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[6]A prominent Little Rock Attorney stated:

> Virtually no attorneys in this area are willing to accept complex civil rights cases such as this one on a contingent fee basis since current awards to not provide a market incentive to attract competent counsel to do so. ... [I]n this district ... competent counsel have simply been forced by market pressures out of these cases and into more renumerative areas of practice.
>
> * * *
>
> It has been our experience that a number of attorneys in this geographic area who once were willing to accept civil rights cases on a contingent fee basis simply have found that it is economically impossible to survive in this manner.
>
> * * *
>
> It is my opinion that the fee awards in federal courts to prevailing plaintiffs in civil rights cases have been grossly inadequate to attract a sufficient number of competent counsel willing to take these cases so that prospective plaintiffs in these cases are able to secure counsel.

Decl. of R. Quiggle, Aug. 30, 1990, at 2-5 (¶¶ 3, 6, 12). Similarly, Little Rock Attorney John Walker explained:

> The willingness of attorneys as a group to accept civil rights cases is on a rapid decline. I regularly receive between five and ten calls per day from race discrimination victims who are in need of legal representation. In addition, each week my firm receives so many referrals of civil rights cases from other attorneys that we generally are unable to

(continued...)

adequate compensation for the risk inherent in a contingent fee case had not been consistently awarded in Arkansas, attorneys had fled this type of work. Plaintiffs' evidence showed that the attorneys who remained in this field of practice could not survive financially without adequate compensation for risk.[7] Plaintiffs' evidence conclusively

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[6](...continued)

> consult with most. The persons making referrals normally have nowhere else to send the prospective plaintiffs, and, in most cases, given the decline in attorneys accepting civil rights cases, I am unable to recommend another attorney. Of those prospective plaintiffs with whom I consult, I am forced to turn down many cases -- even very solid claims. ...
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> * * *
>
> [T]here is presently no "market" for federal civil right cases, since federal judges in the past have simply decided the fee after the litigation was completed on an *ad hoc* basis. The only measure of "market" is the number of lawyers who will not accept the burdens of civil rights litigation, given this "market's" experience with fees awarded when cases have been successful.

Walker Decl., August 1990, at 4, 8 (¶¶ 6, 14).

[7]Plaintiffs' co-lead attorney, P.A. Hollingsworth, stated: "My law firm is currently on the brink of financial disaster because civil rights cases have represented a substantial portion of my docket in the past few years." Supp. Decl. of P.A. Hollingsworth, April 25, 1991, at 3, ¶ 2.

demonstrated that without compensation for risk, victims of racial discrimination in Arkansas would not be able to find legal representation.[8]

The Court made explicit findings of fact that the plaintiffs in this case experienced actual difficulty in locating competent counsel and that the relevant market compensates contingency cases as a class by enhancing attorneys' fees by two to five times the normal hourly billing rates. J.S. App. A-13. Even though the record more than justified the requested risk adjustment of 100 percent, the Court awarded only a 50 percent enhancement.

THE COURT LACKS JURISDICTION OVER THIS APPEAL

Defendants-appellants claim that the Court has jurisdiction under 28 U.S.C. § 1253. J.S. at 2. Defendants cite no other basis of jurisdiction and plaintiffs are aware of no other jurisdictional basis.

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[8]The Lieutenant Governor of Arkansas, a prominent Arkansas attorney, stated: "Unless the market compensates for the economic risks of contingency fee cases, attorneys generally will not accept such cases." Decl. of Jim Guy Tucker, Aug. 30, 1990, at 2, ¶ 5.

The provision on which defendants base jurisdiction reads in its entirety as follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253 (1988). This provision on its face does not apply to an order awarding attorneys' fees and costs. An award of attorneys' fees and costs is not an interlocutory or permanent injunction.[9] The statute authorizes a direct appeal only from an order granting or denying an interlocutory or permanent injunction. Therefore, the statute does not provide jurisdiction over the order at issue in this appeal.

The Court has previously addressed the precise issue raised by this appeal and has unanimously concluded that

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[9]The Court has observed that an award of attorneys' fees is a collateral matter "uniquely separable from the cause of action to be proved at trial." *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 452 (1982).

there is no jurisdiction under 28 U.S.C. § 1253 over an independent appeal of an award of attorneys' fees. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 n.16 (1980), the Court explained: *"we would not have appellate jurisdiction under 28 USC § 1253 to decide the attorney's fee question had it alone been appealed."*[10]

Dismissal of this appeal for lack of jurisdiction is consistent with the concern previously expressed by the Court about the need to avoid mandatory jurisdiction over collateral matters, such as attorneys' fees. In interpreting 28 U.S.C. § 1252 (1988), a former basis of mandatory appellate jurisdiction, the Court stated: "[A] construction of § 1252 that would require us to review collateral issues coming to us as independent matters . . . would undermine the

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[10]In *Supreme Court of Virginia*, the Court took jurisdiction, under § 1253, of an appeal from the imposition of an injunction and also of the simultaneous appeal from an award of attorneys' fees. In finding jurisdiction over the attorneys' fee question, the Court relied on the "whole case" doctrine. Under the "whole case" doctrine, if the appeal is from an order granting or denying an injunction, the Court may also decide other issues in the case that are presented at the same time. *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4040, at 157 & n.49 (1988).

effectiveness of the direct appeal provision. . . . [T]his Court would be required to give precedence to issues outside the congressional definition of public importance. We would, for example, be obliged to crowd our docket with appeals concerned solely with attorney's fee awards or pendent claims arising under state law." *Heckler v. Edwards*, 465 U.S. 870, 884-85 (1984).[11]

A long line of decisions holds that 28 U.S.C. § 1253 is limited to appeals from the grant or denial of an injunction. Attempted appeals from other types of orders must be dismissed for lack of jurisdiction. "Jurisdiction under the Three-Judge Court Act is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purpose of Congress . . . to keep within narrow confines our appellate docket.'" *Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (quoting *Phillips*

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[11]Section 1252 was repealed in 1988. Act of June 27, 1988, 100th Cong., 2d Sess., Pub.L. 100-352, § 1, 102 Stat. 662. Prior to the repeal of § 1252, the Court of Appeals for the Ninth Circuit ruled that a decision awarding or denying attorneys' fees is not directly appealable under 28 U.S.C. § 1252. *League of Women Voters v. FCC*, 751 F.2d 986 (1985).

v. United States, 312 U.S. 246, 250 (1940)). *See also Gunn v. Committee to End the War in Vietnam*, 399 U.S. 383, 387 (1970). "[O]nly a narrow construction [of § 1253] is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974) (footnote omitted).

Where no injunction was at issue, the Court has consistently dismissed appeals based on § 1253. For example, *Rockefeller v. Catholic Medical Center*, 397 U.S. 820 (1970)(per curiam), held: "The judgment appealed from does not include an order granting or denying an interlocutory or permanent injunction and is therefore not appealable to this Court under 28 USC § 1253." In *Gerstein v. Coe*, 417 U.S. 279 (1974)(per curiam), the Court dismissed, "for want of jurisdiction," an appeal from a declaratory judgment entered by a three-judge District Court, ruling: "Title 28 USC § 1253, under which this

appeal is sought to be taken, does not authorize an appeal from the grant or denial of declaratory relief alone." Similarly, in *Gunn*, the Court dismissed, for want of jurisdiction, an appeal taken under 28 U.S.C. § 1253, because the three-judge District Court had neither granted nor denied an injunction, but had merely written "a rather discursive per curiam opinion," 399 U.S. at 387.

In this case, the only issue presented in the Jurisdictional Statement is the award of attorneys' fees. The merits were finally determined in two prior appeals. Therefore, it is clear that the Court lacks jurisdiction over the instant appeal and that the appeal must be dismissed.

CONCLUSION

For the reasons stated, the appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

Penda D. Hair

P.A. HOLLINGSWORTH
415 Main Street
Little Rock, AR 72201
(501) 374-3420

PENDA D. HAIR*
1275 K Street, N.W.
Suite 301
Washington, DC 20005
(202) 682-1300

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON
DAYNA L. CUNNINGHAM
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

*Counsel of Record

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No. 91-1210

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BILL CLINTON, GOVERNOR OF ARKANSAS, ET AL ..... *Appellants*

vs.

M. C. JEFFERS, ET AL ..... *Appellees*

APPELLANTS' SUPPLEMENT TO JURISDICTIONAL STATEMENT

WINSTON BRYANT
TIM HUMPHRIES
FRANK J. WILLS, III*

Arkansas Attorney General
323 CENTER ST., SUITE 200
LITTLE ROCK, AR 72201-2610
(501) 682-2007

**Counsel of Record*

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APPELLANTS' SUPPLEMENT TO JURISDICTIONAL STATEMENT

Appellees have moved to dismiss this appeal, ostensibly because the Court does not have jurisdiction to entertain it under 28 U.S.C. §1253 (1988) since the order appealed from is not one granting or denying an interlocutory or permanent injunction. Motion to Dismiss, Page 8. Contrary to appellees' assertion, it specifically has been held that the United States Supreme Court has exclusive jurisdiction under 28 U.S.C. §1253 over appeals from attorney-fee awards made by a properly-convened three-judge district court in Voting Rights Act cases. *Weiser v. White,* 505 F.2d 912, 913, 918 (5th Cir.) *cert. denied,* 421 U.S. 993 (1975). Although, technically, such an order is neither a grant nor a denial of an injunction, collateral matters dependent upon the injunctive suit should be heard under 28 U.S.C. §1253 to assure the orderly process of judicial administration. Id. at 914; *see Benson v. Beens,* 456, F.2d 244, 245 (8th Cir. 1972). This holds true notwithstanding that the principal appeal has been resolved at an earlier time. *Weiser,* 505 F.2d 913.

Should the Court decline to exercise jurisdiction over this appeal, appellants respectfully request that it follow its previous practice employed in appeals from three-judge courts when the appellate jurisdictional issue was unsettled, which "has been to vacate the district court judgment and remand the case for entry of a fresh decree from which an appeal may be taken to the appropriate court of appeals." *Norton v. Matthews*, 427, U.S. 524, 531 (1976); *Gonzalez v. Automatic Employers Credit Union*, 419 U.S. 90, 101 (1974); *Wilson v. City of Port Lavaca*, 391 U.S. 532 (1968). Given that the Eighth Circuit has refused to entertain appeals from three-judge district courts, *see Doe v. Turner*, 499 F.2d 1134 (8th Cir. 1973); *Benson*, 456 F.2d 245, appellants did not file a "protective appeal" in this case simultaneously with this appeal. Therefore, should the Court decline to exercise jurisdiction over this appeal and not vacate the district court's order as appellants have requested, appellants will have no avenue of relief from the order enhancing appellees' already-generous attorney's fee award. See FRAP 4(a)(1)(5).

Appellants respectfully request that appellees' Motion to Dismiss be denied, or, in the alternative, that the district court's attorney fee award be vacated and remanded with instructions to enter a fresh decree.

Respectfully submitted,

WINSTON BRYANT
Attorney General

BY: FRANK J. WILLS, III, #80162
Assistant Attorney General
323 CENTER ST., SUITE 200
LITTLE ROCK, AR 72201-2610
(501) 682-2007
Attorneys for Appellants